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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**
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13 DANIEL I MAYA REYES,

14 Plaintiff,

15 v.

16 WELLS FARGO BANK, NA, *et al.*,

17 Defendants.
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Case No. 2:12-CV-00585-KJD-CWH

ORDER

19 Before the Court is the Motion to Dismiss (#5) of Defendants Wells Fargo Bank, Western
20 Progressive, and Mortgage Electronic Registration Systems (collectively “Defendants”). Plaintiff has
21 filed an opposition (#8) and Defendant has filed a reply (#12).

22 Plaintiff’s reply was filed nine days late. Plaintiff filed a Motion for Leave to File Out of
23 Time Opposition (#9). Defendants responded to this motion (#10). Because Defendant has failed to
24 show any prejudice as a result of the delay, the Motion for Leave to File is granted.
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1 I. Background

2 In January 2007, Plaintiff received a \$200,000 loan from Community Lending, Inc. to finance
3 the purchase of real property at 5969 Alcott Ave. Las Vegas, Nevada (the "Property"). Plaintiff gave
4 Community Lending a Deed of Trust, which was recorded in the Clark County Recorder's Office on
5 February 10, 2007. Lawyer's Title of Nevada, Inc. was named as Trustee.

6 Plaintiff failed to pay his mortgage and in June, 2010, Defendant Western Progressive, acting
7 as agent for the Trustee, provided Plaintiff with a Notice of Breach and Default and Election to Sell.
8 Plaintiff failed to cure the deficiency and a Notice of Trustee's Sale was recorded on March 7, 2011.
9 The Property was sold to Defendant Wells Fargo on March 7, 2011 and a Trustee's Deed Upon Sale
10 was recorded on March 10, 2011.

11 Plaintiff filed this action asserting claims for violation of NRS § 598D.100, unfair lending
12 practices, unjust enrichment, wrongful foreclosure, breach of the implied covenant of good faith and
13 fair dealing, violations of NRS § 649, and several other equitable claims.

14 II. Discussion

15 A. Legal Standard for Motion to Dismiss

16 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
17 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short
18 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
19 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require
20 detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic
21 recitation of the elements of a cause of action." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
22 (citations omitted). "Factual allegations must be enough to rise above the speculative level."
23 Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
24 factual matter to "state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (citation
25 omitted).

1 In Iqbal, the Supreme Court clarified the two-step approach district courts are to apply when
2 considering motions to dismiss. First, a district court must accept as true all well-pled factual
3 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
4 Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory
5 statements, do not suffice. Id. at 1949. Second, a district court must consider whether the factual
6 allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially
7 plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable
8 inference that the defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint
9 does not permit the court to infer more than the mere possibility of misconduct, the complaint has
10 "alleged—but not shown—that the pleader is entitled to relief." Id. (internal quotation marks
11 omitted). When the claims in a complaint have not crossed the line from conceivable to plausible,
12 the complaint must be dismissed. Twombly, 550 U.S. at 570.

13 B. Uncontested Claims

14 Local Rule 7-2 provides that failure to provide points and authorities in opposition to a
15 motion constitutes consent to granting that motion. Defendants have moved for dismissal of all of
16 Plaintiff's claims and provided argument and authority supporting their positions. In response,
17 Plaintiff's opposition only addresses "the one pivotal issue in this case: Whether Defendant Western
18 Progressive, LLC was required to be licensed as a Collection Agency under NRS § 649.075(1)."
19 Accordingly, Plaintiff has consented to granting of the Motion to Dismiss as to all other claims.
20 Specifically, the Motion is granted as to Plaintiff's causes of action for violation NRS § 598D.100,
21 unfair lending practices, unjust enrichment, wrongful foreclosure, breach of the implied covenant of
22 good faith and fair dealing, injunctive relief, declaratory relief, quiet title, rescission, and slander of
23 title.

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1 C. NRS § 649

2 Pursuant to NRS § 649, it is a violation of state law to violate any provision of the federal
3 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 *et seq*; NRS § 649.370. Courts of
4 this district have consistently held that non-judicial foreclosures are not an attempt to collect a debt
5 under the FDCPA and similar statutes. Kenneweg v. IndyMac Bank, FSB, 2011 WL 13853, *2
6 (D.Nev. 2011) (holding NRS § 649 and FDCPA inapplicable where defendants are not debt
7 collectors as defined in the statute); see also Conley v. Bank of America N.A., 2011 WL 3444196, *4
8 (D.Nev. 2011). Additionally courts in this district have held that , “the FDCPA’s definition of ‘debt
9 collector’ does not ‘include the consumer’s creditors, a mortgage servicing company, or any assignee
10 of the debt, so long as the debt was not in default at the time it was assigned.’” Camacho–Villa v.
11 Great W. Home Loans, 2011 WL 1103681, at *4 (D.Nev.2011) (quoting Croce v. Trinity Mortg.
12 Assurance Corp., 2009 WL 3172119, at *2 (D.Nev.2009))

13 Despite the fact that no Nevada court has ever held that a loan servicer is a debt collector
14 under FDCPA or NRS § 649, Plaintiff argues that Defendant Western Progressive was “attempting to
15 collect a debt” for purposes of the statute when it recorded the Notice of Default and the Notice of
16 Trustee’s Sale. As support for his interpretation of NRS § 649, Plaintiff offers a Cease and Desist
17 Order issued by the Nevada Department of Business and Industry Financial Institutions Division
18 against another loan servicer, opining that it was required to be a licensed collection agency. The
19 statement by the Department of Business and Industry interprets a version of the statute that was not
20 in effect at the time of the foreclosure, is directed toward non-parties to this action, and is in no way
21 binding on this Court. Plaintiff’s claim is not supported by authority and is not plausible.
22 Accordingly, it is dismissed.

23 III. Conclusion

24 **IT IS HEREBY ORDERED** that Plaintiff’s Motion for Leave to File Out of Time
25 Opposition (#9) is **GRANTED**.

1 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Dismiss (#5) is **GRANTED** and
2 this action is **DISMISSED**.

3 **IT IS FURTHER ORDERED** that Plaintiff may file a motion seeking leave to file an
4 amended complaint, including a proposed amended complaint on or before Nov. 12, 2012. Plaintiff
5 will not be permitted to amend his complaint to state claims based on legal theories rejected by the
6 Court in this Order.

7 DATED this 29th day of October 2012.

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12 Kent J. Dawson
13 United States District Judge
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